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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WHIRLPOOL CORPORATION,

Petitioner,

VS.

COLOMBO A. SPAGNUOLO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION BY WHIRLPOOL CORPORATION FOR A WRIT OF CERITIORARI

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STATEMENT OF THE CASE

Colombo A. Spagnuolo, the respondent, was demoted from his job as manager of the Builder Department of the Charlotte Sales Division of Whirlpool Corporation one month short of his fifty-third birthday and two months short of the twenty-fourth anniversary of his employment with the petitioner. When demoted, Spagnuolo requested that he be given the Charlotte territory in his demoted status as a territory manager. Instead, Whirlpool, in violation of its written employment policy, gave respondent a distant territory, assigned him a yearly sales quota which was more than double the amount of sales that the territory had ever produced, and misrepresented to him the amount of sales previously made in the territory.

Spagnuolo was replaced in his position as builder sales manager by Daniel Brattain, a man who had just turned forty. Whirlpool asserts in its Statement of the Case that "Brattain's performance record as Heating and Cooling Manager was far superior to that of the respondent." (Petition @ 3) However, the evidence offered in this case was directly to the contrary. Spagnuolo was twice awarded the Jack Sparks Whirlpool Achievement Award for being the outstanding sales manager in the entire country for Whirlpool Corporation. In the seven years that he was builder sales manager, his department in Charlotte accounted for sixty-nine percent of the profits made in the United States by Whirlpool for the sale of all Whirlpool products, not just builder products. Respondent's sales and profit quotas, established by Whirlpool, were exceeded by him in every year of his tenure except for 1974, which was a recession year when building starts took a drastic downturn. During the same seven year period, Daniel Brattain made his sales quota on only three occasions, and then by small margins. Brattain's performance was so marginal that the Whirlpool Corporation found it necessary in 1976 to take fifty percent of his territory and award it to an independent distributor because he was not "doing a good job".

At the trial of this case, respondent introduced abundant direct evidence showing that Whirlpool proceeded against him solely on the basis of his age. Testimony was offered that Mr. McCall, the general sales manager of the Charlotte Sales Division and plaintiff's immediate supervisor, stated less than a year before plaintiff's termination, that he had "too many fifty year old managers or people nearing fifty years of age, that we have to think of getting rid of." Evidence was offered that Mr. Johnston, the regional manager of petitioner for the Southeast Region, stated on two occasions that he had a plan to replace the older builder sales managers with younger sales managers, including specifically by name, respondent and two other builder sales managers. Mr. Michael Wheeler testified that Mr. Johnston told him that he "was one in a series of changes that he hoped to initiate in order to replace older builder sales managers and called Spagnuolo by name" as well as Vern Perry and Raymond Klausing. Within six months of enunciating this plan, three of the four builder sales managers in the Southeast Region were replaced by younger men. In May of 1977, Michael Wheeler, age 33, replaced Ray Klausing, age 55; on June 1, 1977 Dennis Fitch, in his middle 30's, replaced Vern Perry, age 54; and on November 9, 1977, Daniel Brattain, age 40, replaced the respondent, C.A. Spagnuolo, age 53. Evidence was offered that James Workinger, a national manager for Whirlpool, heard the statements of Mr. Johnston concerning the impending termination of respondent on account of age, and told respondent and another Whirlpool employee about these statements. A letter of Mr. Workinger to respondent was introduced stating that the demotion of respondent was "one of the injustices in life" and that respondent had been "screwed" by Whirlpool. A memo from Mr. McCall to Mr. Johnston, written immediately prior to respondent's demotion, was introduced, asking "should I now unload on Spagg?"

The former merchandising manager of the Charlotte sales branch of Whirlpool testified of a statement made by

Mr. McCall, the general sales manager "that he had to get rid of Charlie Gardner and Ed Hooks (two territory managers) because of their age." Thereafter, Mr. Hooks and Mr. Gardner were both terminated. Spagnuolo, himself, hired a territory manager to work in the builder department in 1976 who was fifty-one years of age. At that time respondent was told by Mr. McCall, the general manager, and Mr. Johnston, the regional manager, "not to hire anybody this old again" and "not to hire any more old people". The personnel file of Whirlpool on respondent was put into evidence, which stated "Do not publish" the reason for Spagnuolo's demotion. The evidence also demonstrated the blatant refusal of Whirlpool to post the poster required by the Age Discrimination in Employment Act advising employees of their rights under the Act even though it was aware of the existence of the Act and the regulations of the Department of Labor promulgated thereunder.

The evidence graphically illustrated Whirlpool's plan to begin ridding itself of older managers. The jury listened to direct statements made by high level Whirlpool officials of the southeastern region concerning replacing older builder sales managers with younger persons, and then, witnessed the culmination of this plan by the replacement of three of the four builder sales managers, including the plaintiff, by younger men. The jury viewed documentary evidence taken from defendant's own files demonstrating clearly that defendant's actions were motivated by arbitrary age discrimination. In fact, the Fourth Circuit noted in its opinion that the evidence in this case "tended to show that Whirlpool proceeded against plaintiff and others solely because of age and not as a result of any other personal characteristic." *Spagnuolo v. Whirlpool Corporation*, 641 F.2d 1109, 1115 (4th Cir. 1981).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The Fourth Circuit Opinion Is Not In Conflict With Prior Decisions Of This Court With Respect To The Order Of Proof Under The Age Discrimination In Employment Act.

Petitioner asks this Court to grant a writ of certiorari because "the Fourth Circuit's decision regarding the order of proof is in conflict with the prior decisions of this Court and other courts of appeals." (Petition at 4). Petitioner incorrectly states that it "appealed the judgment of the District Court, alleging that the jury had been improperly instructed upon the allocation and order of proof in a case under the ADEA." (Petition at 4). In fact, Whirlpool did not assert in the trial court that *McDonnell Douglas* mandated a required order of proof, and it did not submit requests for instructions to the trial court patterned after the *McDonnell Douglas* prima facie case illustration. Petitioner also did not present to the Fourth Circuit as an issue for review, the proposition that the *McDonnell Douglas* format of proof was mandatory in an ADEA case. As a consequence, this issue was never argued or briefed in either the district court or the court of appeals, and is not an appropriate subject for the granting of a writ of certiorari. *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 147 n. 2 (1970).

Whirlpool now contends for the first time that this Court's decision in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) mandates a tripartite presentation of evidence in an age discrimination case — initially, a plaintiff must present evidence limited to satisfying the four elements of the prima facie case illustration; next, the employer must present evidence of his legitimate business reasons for the decision; and thereafter, the plaintiff must present direct evidence of discrimination, evidence of pretext or evidence that the business decision was applied in a discriminatory fashion. According to petitioner, if the

trial court does not adhere to this rigid order of proof, a judgment cannot stand. In actuality, the order of proof in the trial court comported with the *McDonnell Douglas* format. The plaintiff's case in chief established a prima facie case under *McDonnell Douglas* and also presented direct evidence of age discrimination as well as evidence of pretext. Whirlpool thereafter introduced evidence intended to show its reasons for the demotion. On rebuttal, the plaintiff offered additional direct evidence of discrimination as well as evidence of pretext. It is true that evidence of pretext was introduced by the plaintiff not only on rebuttal, but also during its case in chief and by cross-examination of the defendant's witnesses. However, we do not read *McDonnell Douglas* as prohibiting such a practice. In fact, this Court in its recent decision in *Texas Department of Community Affairs v. Burdine*, ___ U.S. ___, 101 S. Ct. 1089 (1981) sanctioned such a logical order of proof:

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case . . . This evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendent, will suffice to discredit the defendant's explanation. 101 S. Ct. at 1095 n. 10.

Petitioner did consistently and erroneously maintain at both the trial and appellate level that it was entitled to a judgment if it "merely articulated a legitimate nondiscriminatory reason" for its job actions toward respondent. Whirlpool, in its requested instructions submitted to the trial court, lifted this phrase completely out of context from the prima facie case illustration of *McDonnell Douglas*, and requested the trial court to utilize the

phrase, with no other explanation to the jury of the relevant aspects of a prima facie case. Petitioner's proffered instructions erroneously asked the court to charge that even if Spagnuolo proved that but for his age he would not have been demoted and assigned the distant territory, the jury must find "no liability" if "Whirlpool merely articulate(s) or state(s) a legitimate, non-discriminatory reason" for its actions. The proposed instructions did not inform the jury that it could find the alleged business reason to be pretextual; rather, under petitioner's instructions, the articulation of a reason, by itself, mandated a verdict for Whirlpool. Under such instructions Whirlpool would automatically prevail if it offered *any* evidence of a legitimate business reason for its actions. The trial court correctly rejected this erroneous request:

> COURT: I think it's more than articulate a reason . . . their saying the words doesn't require the jury to believe the words. That raises the defense but it doesn't instruct the jury. No, I think that is an erroneous request legally.

Petitioner's view of *McDonnell Douglas* and its progeny was also rejected by the Fourth Circuit:

> [Whirlpool] reads *Sweeney* as holding that the mere articulation of a legitimate nondiscriminatory reason is sufficient for the employer to be entitled to judgment. We, however, read *Sweeney* to hold that the articulation of a legitimate nondiscriminatory reason is sufficient to insulate an employer from a directed verdict against it, *i.e.*, it dispels the adverse inference from a plaintiff's prima facie case. The jury in its consideration of all of the evidence may still find that the wrong occurred in the manner established by plaintiff. 641 F.2d at 1112

The interpretation of the law expressed by the Fourth Circuit in the present action was endorsed by this court in

Texas Department of Community Affairs v. Burdine, ____ U.S. ____, 101 S. Ct. 1089 (1981). In *Burdine* this court made it clear that the articulation of a business reason does not entitle the employer to judgment, but merely "destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence." 101 S. Ct. at 1095 n. 10

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. 101 S. Ct. at 1094

The trial judge was also correct in deciding not to employ the *McDonnell Douglas* formula in his charge to the jury.[1] In *McDonnell Douglas*, this Court recognized that in most Title VII cases a plaintiff does not have available direct evidence of discrimination, and also, that the employer has the best access to the reasons that precipitated the job action complained about. Consequently, the Court held that a plaintiff in a Title VII case may establish a prima facie case by proving that he "belongs to a racial minority", that he "applied and was qualified for a job for which the employer was seeking applicants", that "despite his qualifications, he was rejected", and that "after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications," 411 U.S. at 802. Such a showing raises an inference of discrimination and causes the burden to shift to the employer "to articulate some legiti-

1. Neither petitioner nor respondent requested the trial court to utilize the *McDonnell Douglas* guidelines in his instructions to the jury, although Whirlpool did request the court to charge that the jury must return a verdict of "no liability" if Whirlpool merely articulated a legitimate business reason for its action.

mate, non-discriminatory reason for the employee's rejection." 411 U.S. at 802. By adducing such evidence, the employer meets plaintiff's prima facie case. The plaintiff, however, must then "be afforded a fair opportunity" to show that the employer's stated reason, "was in fact pretext." 411 U.S. at 804. The *McDonnell Douglas* formulation allows a Title VII plaintiff to have his day in court, even though he does not have available direct evidence of discrimination, by requiring the employer to come forward and explain the reason for its job actions.

This Court has cautioned, though, that the *McDonnell Douglas* guidelines were "never intended to be rigid, mechanized or ritualistic", *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 578 (1978), nor to be the exclusive method for proving a Title VII claim of discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977). The Courts of Appeals considering the question have determined that the *McDonnell Douglas* format may be appropriate in a jury trial of an age discrimination case, but should not be applied inflexibly to all such cases. *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 919-920 (2nd Cir. 1981); *Smith v. University of North Carolina*, 632 F.2d 316, 332-33 (4th Cir. 1980); *Loeb v. Textron, Inc.* 600 F.2d 1003, 1014-1019 (1st. Cir. 1979); *Laugesen v. Anaconda Company*, 510 F.2 307 (6th Cir. 1975)

For instance in *Laugesen*, the Sixth Circuit stated:

> While it may not be unreasonable to assume that in a proper case the guidelines established in *McDonnell Douglas v. Green* can be applied in age discrimination jury cases, we believe it would be inappropriate simply to borrow and apply them automatically. 510 F.2d at 312.

Similarly, the First Circuit in *Loeb* cautioned:

> While we conclude that *McDonnell Douglas* provides

> an appropriate and workable formula for the trial of age discrimination cases, it should not be used inflexibly as a vehicle for organizing evidence or presenting a case to a jury. Above all, it should not be viewed as providing a format into which all cases of age discrimination must fit . . . *McDonnell Douglas* points to one, but surely not the only, way of establishing a legally sufficient prima facie case and of organizing and analyzing the evidence in a private discrimination case. 600 F.2d at 1017.

Both the First Circuit in *Loeb* and the Fourth Circuit in *Smith* noted that most age discrimination cases will not fit "a 'classic' or 'pure' *McDonnell Douglas* paradigm."

> At least two other types of cases seem likely, one is a case which simply does not fit the mold of the *McDonnell Douglas* formula, as where plaintiff's evidence of discrimination is significantly different. (For example, where plaintiff relies chiefly upon direct evidence of discriminatory motive in a letter or on an admission from defendant). The court should not force a case into a *McDonnell Douglas* format if to do so will merely divert the jury from the real issue; rather, it should use its best judgment as to the proper organization of the evidence and the charge. In cases of this type, the best charge may simply be one that emphasizes that plaintiff must prove, by a preponderance of the evidence, that he was discharged because of his age — with adequate explanation of the meaning of the age statute, the determinative role age must have played, etc. *Loeb*, 600 F.2d at 1018, *Smith*, quoting *Loeb*, 632 F.2d at 335.

In the present action, respondent offered substantial direct evidence of age discrimination by Whirlpool. Perhaps the most significant direct evidence was the statement by the regional sales manager made on two separate occasions, and reported by two different persons, that he had a plan to replace the older

builder sales managers with younger men, and mentioning specifically Spagnuolo by name. The jury also heard the statement of plaintiff's immediate supervisor that he had too many fifty year old managers that he had to get rid of. The other substantial direct evidence of discrimination is set forth in respondent's Statement of the Case (brief of respondent at 2-3). Indeed, the Fourth Circuit noted in its opinion:

> *In this case, the plaintiff demonstrated not an inference but rather the fact of age discrimination* . . . Accordingly, it simply does not fit the mold of the *McDonnell Douglas* formula because the plaintiff relied chiefly upon direct evidence of discriminatory motive. 641 F.2d at 113 n. 2. (emphasis added)

Given the overwhelming direct evidence of age discrimination, it would have been superfluous and confusing for the trial judge to instruct the jury using the *McDonnell Douglas* guidelines, particularly in light of the fact that neither petitioner nor respondent requested the trial court to employ the *McDonnell Douglas* formula in his instructions. Accordingly, the court was correct in not casting its charge in a *McDonnell Douglas* format but rather simply emphasizing that plaintiff had to prove by a preponderance of the evidence that he was discriminated against due to his age. *See Loeb v. Textron*, 600 F.2d at 1018; *Smith v. University of North Carolina*, 632 F.2d at 335.

Petitioner argues that the failure of the trial court to utilize the *McDonnell Douglas* format, in its instructions effectively "required Whirlpool to prove that its demotion of the respondent was justified." (Petition at 9). However, the trial judge on five separate occasions instructed the jury that the burden of proof on every issue was upon the plaintiff.[2] In addition, the trial judge specifically told the jury two other times that the defendant had no burden to prove the legitimacy of its proffered business reasons:

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2. Petitioner failed to reproduce that portion of the trial judge's instruction in the appendix accompanying its petition.

> The plaintiff says that age was a producing cause, one of the principal reasons for his discharge. The defendant denies that age played a part in the decision. The defendant also advances evidence of business reasons for the decision. *Now, the defendant has no burden to prove anything, so the burden of proving a business reason is not, you don't have to decide whether the defendant has proved that business reasons exist.* The only question you have to decide is whether the plaintiff has satisfied you that age was the, was a principal or producing cause for his demotion . . . *The point I'm making is that the defendant has no burden to prove anything.* The fact that the defendant may have satisfied you that there were valid business reasons doesn't end your inquiry. You've still got to make a finding as to whether the palintiff has satisfied you that age played a producing part or was one of the but for causes of the decision. (emphasis added)

Clearly, the jury was not misled on this point.

II. THE FOURTH CIRCUIT CORRECTLY DECIDED THE STANDARD OF CAUSATION NECESSARY TO SHOW A VIOLATION OF THE ADEA BY REQUIRING A PLAINTIFF TO SHOW THAT AGE WAS "A DETERMINING FACTOR" IN THE EMPLOYMENT DECISION

Petitioner presented to the Fourth Circuit Court of Appeals for review the issue of "whether the trial court erred in refusing to instruct the jury that the ADEA was violated only if age was *the* determinative factor in the demotion decision." It contended both at trial and before the Court of Appeals that a plaintiff's ultimate burden of persuasion was to show that age was *the* determinative factor in the employment decision. In fact, petitioner's jury instructions submitted to the trial court erroneously required respondent to prove that age must be *the* determinative factor not only in the decision to demote him, but also in the subsequent decision to refuse to assign him the Charlotte sales territory.[3] The proffered instructions read as follows:

> Before you may find for Spagunolo, you must be convinced by a preponderance of the evidence that Whirlpool demoted Spagnuolo *and* refused to allow him to have the Charlotte territory because of his age. In other words, Spagnuolo must prove by a preponderance of the evidence that his age was *the determinative or key factor* in Whirlpool's decision to demote him *and* refuse his request regarding the Charlotte territory. Suspicions that age was *the determinative or key factor* in Whirlpool's decisions regarding Spagnuolo cannot be the basis for finding for Spagnuolo. (emphasis added)

The Fourth Circuit correctly rejected petitioner's contention concerning this standard of causation:

> Whirlpool contends that the jury should have been instructed that plaintiff's age must have been *the* determinative factor in Whirlpool's decision to demote him in order for the jury to find a violation of the Act.
>
> Whirlpool's argument is foreclosed by our decision in *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980). There, in prescribing the standard of causation that must be met to show a violation of the Act, we said that a plaintiff is required "to show that age was *a* determining factor in his discharge." The phrase was derived from *Loeb v. Textron, Inc.*, 600 F.2d 1003, (1st Cir. 1979), and other language in that opinion defines what is meant. There it was said that for an employee to recover under the Act it is not enough that he show merely that his age was a factor that affected the decision to discharge him. Rather, he must show that "but for" his employer's motive to discriminate against him because of his age, he would not have been discharged. It is in this sense that we, too, use

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3. However, it is clear that if *either* decision was predicated upon age, plaintiff would be entitled to recover. *See Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir. 1977); *Bertrand v. Orkin Exterminating Co.*, 454 F.Supp. 78, 81 (N.D. Ill. 1978).

> the phrase "a determining factor." 641 F.2d at 1112. (emphasis by the court)

Petitioner states that the Fourth Circuit has now departed from its position enunciated in *Smith v. Flax* of "requiring an age discrimination plaintiff to prove that age was a determining factor in a discharge", and cites *Smith v. University of North Carolina*, 632 F.2d 316 (4th Cir. 1980) in support of this proposition. (Petition at 12). We read the decision in *Smith v. University of North Carolina* as being completely in accord with both *Smith v. Flax* and *Spagnuolo*. There, the Fourth Circuit stated with respect to the standard of causation required to show a violation of the ADEA:

> Age need not be the sole reason but it must have been a substantial or motivating reason — a determinative reason — in the University's determination. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979). That determination . . . is the central concern in all age discrimination cases. 632 F.2d at 333.

In further elucidating the standard of causation required under the ADEA, the *Smith* court stated, "It is clear, of course, that the law requires only that age be *a* causative or determinative factor in the decision, not the sole reason." 632 F.2d at 337 (emphasis by the court).[4]

Petitioner incorrectly asserts that three circuits have held that an ADEA plaintiff must show that age was *the* determinative factor in the employment decision in order to show a violation of the Act, citing *Loeb v. Textron, Inc., supra, Smithers v. Bailar*, 629 F.2d 892 (3rd Cir. 1980); and *Kephart v. Institute of Gas Technology*, 630

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4. The Fourth Circuit reiterated its position concerning the standard of causation in *Equal Employment Opportunity Commission v. Baltimore and Ohio Railroad*, 632 F.2d 1107, 1110 (4th Cir. 1980) where it stated, "It is, of course, necessary that age be a determinative factor, but not the sole determining factor."

F.2d 1217 (7th Cir. 1980); *cert. den.*, ___ U.S. ___, 101 S. Ct. 1418 (1981). An analysis of these cases reveals that the Seventh Circuit has not ruled definitively on the standard of causation required under the ADEA, and the holdings of the First Circuit and Third Circuit are in complete accord with the decision in the case at bar. The Seventh Circuit in *Kephart* did not even discuss the appropriate standard of causation under the ADEA. In *Smithers*, the Third Circuit held that it would be reversible error for a trial court to require a plaintiff to prove that age was *the* determinative factor in the employment decision. That case involved a review of the standard of causation applied by a trial judge in a non-jury ADEA case. The *Smithers* court affirmed the judgment of the trial court, finding that: "Although, isolated statements in the District Court opinion say that appellant failed to prove age was 'the determinative factor' in the Board's decision, the opinion taken as a whole concluded that plaintiff failed to prove age was 'a determinative factor'". 629 F.2d at 897-98. The First Circuit in *Loeb* enunciated the required standard of causation in virtually the same language used by the Fourth Circuit in the case at bar:

> We conclude that, at least where defendant denies that age was a consideration, the plaintiff must prove that he would not have been discharged "but for" his age — *i.e.*, that age must have been a determinative factor." 600 F.2d at 1010-11.

The Fourth Circuit's decision in the present case is in accord with every decision of each court of appeals that has determined the standard of causation necessary to show a violation of the ADEA. Each of these circuits has held that a plaintiff's ultimate burden of persuasion to establish a violation of the ADEA is to show that age was "a determining factor" in the employment decision. *See Geller v. Markham*, 635 F.2d 1027, 1035 (2nd Cir. 1981); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 984-85 (9th Cir. 1981); *Smithers v. Bailar*, 629 F.2d 892, 896-98

(3rd Cir. 1980); *Loeb v. Textron, Inc.*, 606 F.2d 1003, 1011 (1st Cir. 1979); *Cleverly v. Western Electric Company*, 594 F.2d 638, 641 (8th Cir. 1979); *Marshall v. Air Pax Electronics, Inc.*, 595 F.2d 1043, 1044 (5th Cir. 1979); *Laugesen v. Anaconda Company*, 510 F.2d 307, 317 (6th Cir. 1975). Thus, the Fourth Circuit's decision with respect to the standard of causation necessary to show a violation of the ADEA is clearly correct and provides no basis for granting a writ of certiorari.

CONCLUSION

The order of presentation of evidence in the trial court was not in conflict with the decisions of this Court in *McDonnell Douglas v. Green* and its progeny. The Fourth Circuit decision did not address this contention of petitioner because the issue was not raised in either the district court or the court of appeals. Accordingly, it is not an appropriate subject for the granting of a writ of certiorari.

Petitioner's argument that the articulation of a legitimate nondiscriminatory reason by an employer for its job action entitles it to a judgment in a ADEA case is predicated upon a misapprehension of this Court's prior decisions. The holding of the Fourth Circuit that the articulation of a legitimate reason "dispels the adverse inference of a plaintiff's prima facie case (641 F.2d at 1112) is clearly correct and in accord with the rulings of this Court.

The Fourth Circuit applied the proper standard of causation by requiring an ADEA plaintiff to show that his age was "a determining factor" in the sense that "but for his employer's motive to discriminate against him because of his age, he would not have been discharged." 641 F.2d at

1112. Petitioner's contention that age must be the sole, or the determinative, factor in the employment decision is not supported by the decision of any court of appeals.

For these reasons, we respectfully request the Court to deny the Petition for a writ of certiorari.

Respectfully submitted,

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